

1 JAMES V. FITZGERALD, III (State Bar No. 55632)
2 NOAH G. BLECHMAN (State Bar No. 197167)
3 LAURA A. COX (State Bar No. 296147)
4 McNAMARA, NEY, BEATTY, SLATTERY,
5 Borges & Ambacher LLP
6 1211 Newell Avenue
7 Walnut Creek, CA 94596
8 Telephone: (925) 939-5330
9 Facsimile: (925) 939-0203

10 Attorneys for Defendants
11 CITY OF CONCORD, OFFICER O'BRIEN, OFFICER
12 DONNELLY, OFFICER GOLVINEAUX, SERGEANT
13 ELSBERRY

14
15
16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA

18 ALANY JEAN HELMANTOLER, T.H.,
19 K.H., and M.H., minors, through their
20 guardian ad litem ALANY JEAN
21 HELMANTOLER,

22 Plaintiffs,

23 vs.

24 CITY OF CONCORD, OFFICER
25 O'BRIEN, OFFICER DONNELLY,
26 OFFICER GOLVINEAUX, SERGEANT
27 ELSBERRY, and DOES 1-10,

28 Defendants.

Case No. CV 14-02855 VC

STIPULATED PROTECTIVE ORDER

Action Filed: 6/20/2014

21 The parties, by and through their respective attorneys of record, hereby stipulate to the
22 following protective order being issued in this matter:

23 1. PURPOSES AND LIMITATIONS

24 Disclosure and discovery activity in this action are likely to involve production of
25 confidential or private information for which special protection from public disclosure and from
26 use for any purpose other than prosecuting this litigation would be warranted. Accordingly, the
27 parties hereby stipulate to and petition the court to enter the following Stipulated Protective
28 Order. The parties acknowledge that this Order does not confer blanket protections on all

1 disclosures or responses to discovery and that the protection it affords extends only to the limited
2 information or items that are entitled under the applicable legal principles to treatment as
3 confidential. The parties further acknowledge, as set forth in Section 10, below, that this
4 Stipulated Protective Order creates no entitlement to file confidential information under seal;
5 Civil Local Rule 79-5 sets forth the procedures that must be followed and reflects the standards
6 that will be applied when a party seeks permission from the court to file material under seal.
7

8 2. DEFINITIONS

9 2.1 Party: any party to this action, including all of its officers, directors, employees,
10 consultants, retained experts, and outside counsel (and their support staff).

11 2.2 Disclosure or Discovery Material: all items or information, regardless of the
12 medium or manner generated, stored or maintained (including, among other things, testimony,
13 transcripts, or tangible things) that are produced or generated in disclosures or responses to
14 discovery by any Party in this matter.

15 2.3 "Confidential" Information or Items: information (regardless of how generated,
16 stored or maintained) or tangible things that qualify for protection under standards developed
17 under Federal Rule of Civil Procedure 26(c). This material may include, but is not limited to,
18 medical records, officer personnel records, investigative reports, or other sensitive records
19 marked "CONFIDENTIAL" and other similar confidential records designated as such.

20 2.4 Receiving Party: a Party that receives Disclosure or Discovery Material from a
21 Producing Party.

22 2.5 Producing Party: a Party or non-party that produces Disclosure or Discovery
23 Material in this action.

24 2.6 Designating Party: a Party or non-party that designates information or items that it
25 produces in disclosures or in responses to discovery as "Confidential."

26 2.7 Protected Material: any Disclosure or Discovery Material that is designated as
27 "Confidential."

28 2.8 Outside Counsel: attorneys who are not employees of a Party but who are retained
29 to represent or advise a Party in this action.

1 2.9 House Counsel: attorneys who are employees of a Party.

2 2.10 Counsel (without qualifier): Outside Counsel and House Counsel (as well as their
3 support staffs).

4 2.11 Expert: a person with specialized knowledge or experience in a matter pertinent to
5 the litigation who has been retained by a Party or its counsel to serve as an expert witness or as a
6 consultant in this action and who is not a past or a current employee of a Party or of a competitor
7 of a Party's and who, at the time of retention, is not anticipated to become an employee of a Party
8 or a competitor of a Party's.

9 2.12 Professional Vendors: persons or entities that provide litigation support services
10 (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations; organizing,
11 storing, retrieving data in any form or medium; etc.) and their employees and subcontractors.

12 3. SCOPE

13 The protections conferred by this Stipulation and Order cover not only Protected
14 Material (as defined above), but also any information copied or extracted therefrom, as well as all
15 copies, excerpts, summaries, or compilations thereof, plus testimony, conversations, or
16 presentations by parties or counsel to or in court or in other settings that might reveal Protected
17 Material.

18 4. DURATION

19 Even after the termination of this litigation, the confidentiality obligations imposed
20 by this Order shall remain in effect until a Designating Party agrees otherwise in writing or a
21 court order otherwise directs.

22 5. DESIGNATING PROTECTED MATERIAL

23 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party
24 or non-party that designates information or items for protection under this Order must take care to
25 limit any such designation to specific material that qualifies under the appropriate standards. A
26 Designating Party must take care to designate for protection only those parts of material,
27 documents, items, or oral or written communications that qualify – so that other portions of the
28 material, documents, items or communications for which protection is not warranted are not

1 swept unjustifiably within the ambit of this Order.
2

3 Mass, indiscriminate, or routine designations are prohibited. Designations that are shown
4 to be clearly unjustified, or that have been made for an improper purpose (e.g., to unnecessarily
5 encumber or retard the case development process, or to impose unnecessary expenses and
6 burdens on other parties), expose the Designating Party to sanctions.

7 If it comes to a Party's or a non-party's attention that information or items that it
8 designated for protection do not qualify for protection at all, that Party or non-party must
9 promptly notify all other parties that it is withdrawing the mistaken designation.

10 5.2 Manner and Timing of Designations. Except as otherwise provided in this Order
11 (see, e.g., second paragraph of section 5.2(a), below), or as otherwise stipulated or ordered,
12 material that qualifies for protection under this Order must be clearly so designated before the
13 material is disclosed or produced. Designation in conformity with this Order requires:

14 (a) for information in documentary form (apart from transcripts of depositions
15 or other pretrial or trial proceedings), that the Producing Party affix the legend
16 “CONFIDENTIAL” at the top of each page that contains protected material and/or the first page
17 of stapled/clipped materials if it is a group of related documents. If only a portion or portions of
18 the material on a page qualifies for protection, the Producing Party also must clearly identify the
19 protected portion(s) (e.g., by making appropriate markings in the margins) and must specify, for
20 each portion that it is “CONFIDENTIAL.”

21 A Party or non-party that makes original documents or materials available for
22 inspection need not designate them for protection until after the inspecting Party has indicated
23 which material it would like copied and produced. After the inspecting Party has identified the
24 documents it wants copied and produced, the Producing Party must determine which documents,
25 or portions thereof, qualify for protection under this Order, then, before producing the specified
26 documents, the Producing Party must affix the designation “CONFIDENTIAL” at the top of each
27 page that contains Protected Material. If only a portion or portions of the material on a page
28 qualifies for protection, the Producing Party must clearly identify the protected portion(s) (e.g., by
 making appropriate markings in the margins) and must specify that the material is

1 "CONFIDENTIAL."

2 (b) for testimony given in deposition or in other pretrial or trial proceedings,
3 that the Party or non-party offering or sponsoring the testimony identify on the record, before the
4 close of the deposition, hearing, or other proceeding, all protected testimony, and further specify
5 any portions of the testimony that qualify as "CONFIDENTIAL." When it is impractical to
6 identify separately each portion of testimony that is entitled to protection, and when it appears
7 that substantial portions of the testimony may qualify for protection, the Party or non-party that
8 sponsors, offers, or gives the testimony may invoke on the record (before the deposition or
9 proceeding is concluded) a right to have up to twenty (20) days to identify the specific portions of
10 the testimony as "CONFIDENTIAL." Only those portions of the testimony that are appropriately
11 designated for protection within the 20 days shall be covered by the provisions of this Stipulated
12 Protective Order.

13 Transcript pages containing Protected Material must be separately bound by the
14 court reporter, who must affix to the top of each such page the legend "CONFIDENTIAL," as
15 instructed by the Party or non-party offering or sponsoring the witness or presenting the
16 testimony.

17 (c) for information produced in some form other than documentary, and for
18 any other tangible items, that the Producing Party affix in a prominent place on the exterior of the
19 container or containers in which the information or item is stored the legend "CONFIDENTIAL."
20 If only portions of the information or item warrant protection, the Producing Party, to the extent
21 practicable, shall identify the protected portions, specifying the material as "CONFIDENTIAL."

22 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
23 designate qualified information or items as "CONFIDENTIAL" does not, standing alone, waive
24 the Designating Party's right to secure protection under this Order for such material. If material
25 is appropriately designated as "CONFIDENTIAL" after the material was initially produced, the
26 Receiving Party, on timely notification of the designation, must make reasonable efforts to assure
27 that the material is treated in accordance with this Order.

28 5.4 Privilege Logs. If a party withholds information that is responsive to a discovery

1 request by claiming that it is privileged or otherwise protected from discovery, that party shall
 2 ***promptly*** prepare and provide a privilege log that is sufficiently detailed and informative for the
 3 opposing party to assess whether a document's designation as privileged is justified. *See*
 4 Fed.R.Civ.P. 26(b)(5). The privilege log shall set forth the privilege relied upon and specify
 5 separately for each document or for each category of similarly situated documents:

- 6 (a) the title and description of the document, including number of pages or Bates-
 number range;
- 7 (b) the subject matter addressed in the document;
- 8 (c) the identity and position of its author(s);
- 9 (d) the identity and position of all addressees and recipients;
- 10 (e) the date the document was prepared and, if different, the date(s) on which it
 was sent to or shared with persons other than its author(s); and
- 11 (f) the specific basis for the claim that the document is privileged and protected.

12 Communications involving trial counsel that post-date the filing of the complaint need not
 13 be placed on a privilege log. Failure to furnish this information promptly may be deemed a
 14 waiver of the privilege of protection.

15 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

16 6.1 Timing of Challenges. Unless a prompt challenge to a Designating Party's
 17 confidentiality designation is necessary to avoid foreseeable substantial unfairness, unnecessary
 18 economic burdens, or a later significant disruption or delay of the litigation, a Party does not
 19 waive its right to challenge a confidentiality designation by electing not to mount a challenge
 20 promptly after the original designation is disclosed.

21 6.2 Meet and Confer. A Party that elects to initiate a challenge to a Designating
 22 Party's confidentiality designation must do so in good faith and must begin the process by
 23 conferring directly either in person or by telephone, and may not meet and confer by letter, e-mail
 24 or fax, with counsel for the Designating Party. In conferring, the challenging Party must explain
 25 the basis for its belief that the confidentiality designation was not proper and must give the
 26 Designating Party an opportunity to review the designated material, to reconsider the
 27

1 circumstances, and, if no change in designation is offered, to explain the basis for the chosen
2 designation. A challenging Party may proceed to the next stage of the challenge process only if it
3 has engaged in this meet and confer process first.

4 6.3 Judicial Intervention. If disagreements remain regarding a designation, the parties
5 shall file a joint letter no later than five business days after the meet and confer session, unless
6 otherwise directed by the court. **Lead trial counsel for both parties must sign the letter**, which
7 shall include an attestation that the parties met and conferred in person or by telephone regarding
8 all issues prior to filing the letter. Going issue-by-issue, the joint letter shall describe each
9 unresolved issue, summarize each party's position with appropriate legal authority; and provide
10 each party's final proposed compromise before moving to the next issue. The joint letter shall not
11 exceed ten pages without leave of court. **Parties are expected to plan for and cooperate in**
12 **preparing the joint letter so that each side has adequate time to address the arguments**. In
13 the rare instance that a joint letter is not possible, each side may submit a letter not to exceed four
14 pages, which shall include an explanation of why a joint letter was not possible. The parties shall
15 submit one exhibit to the letter that only sets forth each disputed designation in full, followed
16 immediately by the objections and/or responses thereto. No other information shall be included
17 in any such exhibit. No other exhibits shall be submitted without prior approval by the court.
18 The court will review the submission(s) and determine whether formal briefing or proceedings are
19 necessary. **Discovery letter briefs must be e-filed under the Civil Events category of Motions**
20 **and Related Filings > Motions – General > "Discovery Letter Brief".**

21 In the event that a hearing is ordered, the court expects counsel to appear in person.
22 Permission for a party to attend by telephone may be granted, in the court's discretion, upon
23 written request made at least one week in advance of the hearing if the court determines that good
24 cause exists to excuse personal attendance, and that personal attendance is not needed in order to
25 have an effective discovery hearing. The facts establishing good cause must be set forth in the
26 request.

27 The burden of persuasion in any such challenge proceeding shall be on the Designating
28 Party. Until the court rules on the challenge, all parties shall continue to treat the material in

1 question as "CONFIDENTIAL."

2 7. ACCESS TO AND USE OF PROTECTED MATERIAL

3 7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed
4 or produced by another Party or by a non-party in connection with this case only for prosecuting,
5 defending, or attempting to settle this litigation. Such Protected Material may be disclosed only
6 to the categories of persons and under the conditions described in this Order. When the litigation
7 has been terminated, a Receiving Party must comply with the provisions of section 11, below
8 (FINAL DISPOSITION).

9 Protected Material must be stored and maintained by a Receiving Party at a location and
10 in a secure manner that ensures that access is limited to the persons authorized under this Order.

11 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise
12 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may
13 disclose any information or item designated CONFIDENTIAL only to:

14 (a) the Receiving Party's counsel of record in this action, as well as employees
15 of said Counsel to whom it is reasonably necessary to disclose the information for this litigation;

16 (b) the officers, directors, and employees (including House Counsel) of the
17 Receiving Party to whom disclosure is reasonably necessary for this litigation;

18 (c) experts (as defined in this Order) of the Receiving Party to whom
19 disclosure is reasonably necessary for this litigation;

20 (d) the Court and its personnel;

21 (e) court reporters, their staffs, and professional vendors to whom disclosure is
22 reasonably necessary for this litigation;

23 (f) during their depositions, witnesses in the action to whom disclosure is
24 reasonably necessary. Pages of transcribed deposition testimony or exhibits to depositions that
25 reveal Protected Material must be separately bound by the court reporter and may not be
26 disclosed to anyone except as permitted under this Stipulated Protective Order.

27 (g) the author of the document or the original source of the information.

28 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN

1 OTHER LITIGATION

2 If a Receiving Party is served with a subpoena or an order issued in other litigation
 3 that would compel disclosure of any information or items designated in this action as
 4 “CONFIDENTIAL,” the Receiving Party must so notify the Designating Party, in writing (by fax
 5 and/or e-mail) immediately and in no event more than three court days after receiving the
 6 subpoena or order. Such notification must include a copy of the subpoena or court order.

7 The Receiving Party also must immediately inform in writing the Party who
 8 caused the subpoena or order to issue in the other litigation that some or all of the material
 9 covered by the subpoena or order is the subject of this Protective Order. In addition, the
 10 Receiving Party must deliver a copy of this Stipulated Protective Order promptly to the Party in
 11 the other action that caused the subpoena or order to issue.

12 The purpose of imposing these duties is to alert the interested parties to the
 13 existence of this Protective Order and to afford the Designating Party in this case an opportunity
 14 to try to protect its confidentiality interests in the court from which the subpoena or order issued.
 15 The Designating Party shall bear the burdens and the expenses of seeking protection in that court
 16 of its confidential material – and nothing in these provisions should be construed as authorizing or
 17 encouraging a Receiving Party in this action to disobey a lawful directive from another court.

18 9. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN
 19 THIS LITIGATION

21 The terms of this Order are applicable to information produced by a Non-Party in
 22 this action and designated as “CONFIDENTIAL.” Such information produced by Non-Parties in
 23 connection with this litigation is protected by the remedies and relief provided by this Order.
 24 Nothing in these provisions should be construed as prohibiting a Non-Party from seeking
 25 additional protections.

27 In the event that a Party is required, by a valid discovery request, to produce a
 28 Non-Party’s confidential information in its possession, and the Party is subject to an agreement

with the Non-Party not to produce the Non-Party's confidential information, then the Party shall:

- (1) promptly notify in writing the Requesting Party and the Non-Party that some or all of the information requested is subject to a confidentiality agreement with a Non-Party;
 - (2) promptly provide the Non-Party with a copy of the Stipulated Protective Order in this litigation, the relevant discovery request(s), and a reasonably specific description of the information requested; and
 - (3) make the information requested available for inspection by the Non-Party.

If the Non-Party fails to object or seek a protective order from this court within 14 days of receiving the notice and accompanying information, the Receiving Party may produce the Non-Party's confidential information responsive to the discovery request. If the Non-Party timely seeks a protective order, the Receiving Party shall not produce any information in its possession or control that is subject to the confidentiality agreement with the Non-Party before a determination by the court.¹ Absent a court order to the contrary, the Non-Party shall bear the burden and expense of seeking protection in this court of its Protected Material.

10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Stipulated Protective Order, the Receiving Party must immediately: (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all copies of the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order, and (d) request such person or persons to be bound by the Stipulated Protective Order.

11. FILING PROTECTED MATERIAL

¹ The purpose of this provision is to alert the interested parties to the existence of confidentiality rights of a Non-Party and to afford the Non-Party an opportunity to protect its confidentiality interests in this court.

Without written permission from the Designating Party or a court order secured after appropriate notice to all interested persons, a Party may not file in the public record in this action any Protected Material. A Party that seeks to file under seal any Protected Material must comply with Civil Local Rule 79-5.

12. FINAL DISPOSITION

Unless otherwise ordered or agreed in writing by the Producing Party, within sixty (60) days after the final termination of this action, defined as the dismissal or entry of judgment by the district court, or if an appeal is filed, the disposition of the appeal, each Receiving Party must return all Protected Material to the Producing Party. As used in this subdivision, “all Protected Material” includes all copies, abstracts, compilations, summaries or any other form of reproducing or capturing any of the Protected Material. With permission in writing from the Designating Party, the Receiving Party may destroy some or all of the Protected Material instead of returning it. Whether the Protected Material is returned or destroyed, the Receiving Party must submit a written certification to the Producing Party (and, if not the same person or entity, to the Designating Party) by the sixty day deadline that identifies (by category, where appropriate) all the Protected Material that was returned or destroyed and that affirms that the Receiving Party has not retained any copies, abstracts, compilations, summaries or other forms of reproducing or capturing any of the Protected material. Notwithstanding this provision, Counsel are entitled to retain an archival copy of all pleadings, motion papers, transcripts, legal memoranda, correspondence or attorney work product, even if such materials contain Protected Material. Any such archival copies that contain or constitute Protected Material remain subject to this Protective Order as set forth in Section 4 (DURATION), above.

13. MISCELLANEOUS

13.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek its modification by the Court in the future.

13.2 Right to Assert Other Objections. By stipulating to the entry of this Protective Order no Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Stipulated Protective Order. Similarly,

1 no Party waives any right to object on any ground to use in evidence any of the material covered
2 by this Protective Order.

3 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.
4

5 Dated: November 6, 2014

LAW OFFICES OF JOHN F. MARTIN

7 By: /s/ Marta R. Vanegas

8 John F. Martin
9 Marta R. Vanegas
10 Attorneys for Plaintiffs
11 ALANY JEAN HELMANTOLER, T.H., K.H., and
12 M.H., minors, through their guardian ad litem ALANY
13 JEAN HELMANTOLER

14 Dated: November 7, 2014

15 MCNAMARA, NEY, BEATTY, SLATTERY,
16 BORGES & AMBACHER LLP

17 By: /s/ Noah G. Blechman

18 James V. Fitzgerald, III
19 Noah G. Blechman
20 Laura A. Cox
21 Attorneys for Defendants
22 CITY OF CONCORD, OFFICER O'BRIEN, OFFICER
23 DONNELLY, OFFICER GOLVINEAUX,
24 SERGEANT ELISBERRY

25 **PURSUANT TO STIPULATION, IT IS SO ORDERED:**

26 Dated: November 10, 2014

27 By:

